



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2010

Ms. Lisa Hoyt
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2010-14304

Dear Ms. Hoyt:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 394089 (Department Request Nos 10-624, 10-666, 10-668, and 10-684).

The Texas Department of Agriculture (the "department") received four requests for 48 categories of information. You state you are releasing some of the requested information with redactions in reliance upon a prior ruling of this office. *See* Open Records Letter No. 2010-06374 (2010); *see also* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You state you have redacted some information pursuant to section 552.024(c) of the Government Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.136, 552.137, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information, which you state is a representative sample of the remaining requested

¹Section 552.024(c) authorizes a governmental body to redact the home address and telephone number, social security number, and family member information of a current or former official or employee who chooses not to allow public access to that information. *See* Gov't Code § 552.024(c), (c-1), (c-2).

²Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 1-2 (1990).

information. We have also considered comments submitted by two requestors.³ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the first requestor's complaint that the submitted information does not consist of a representative sample. On July 23, 2010, the department submitted arguments along with what it described as a "representative sample" of the requested records. We note that in requesting a ruling, a governmental body may submit to this office a representative sample of information rather than submitting all the requested records. Gov't Code § 552.301(e)(1) (D). In doing so, it is the governmental body's burden to assure that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Whether the department has additional information that it has not provided is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Accordingly, we must accept the department's representation that the records submitted to this office are truly representative of the requested records as a whole. *See* ORD Nos. 499, 497. This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

The first requestor also argues the department failed to comply with section 552.221 of the Government Code. Gov't Code § 552.221(a), (c), (d). We note that pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public. *See id.* § 552.302. However, a violation of section 552.221 does not result in the presumption of openness.

Next, we note Exhibits F, H, and I are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part the following:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

³We note some comments submitted by the first requestor will be addressed in a complaint by Hadassah Schloss at the Office of the Attorney General.

Gov't Code § 552.022(a)(1). You state this information consists of investigations where the department recommended or assessed penalties against specified companies. Therefore, this information consists of completed investigations that are subject to section 552.022(a)(1). You seek to withhold this information under sections 552.103, 552.107, and 552.111. Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other laws that make information expressly confidential for the purposes of section 552.022(a)(1). Therefore, the department may not withhold the information subject to section 552.022 under section 552.103, section 552.107, or section 552.111 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider whether the department may withhold any of the information subject to section 552.022 under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental

impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Furthermore, if a requestor seeks a governmental body's entire litigation file and the governmental body seeks to withhold the entire file, the governmental body may assert that the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. *See* ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates that the file was created in anticipation of litigation, this office will presume that the entire file is within the scope of the privilege. *See* Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes); *see also Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) (holding that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case").

You state Exhibit F relates to pesticide use and the department has the authority to enforce matters related to pesticide pursuant to Chapter 76 of the Agriculture Code. Agric. Code § 76.1555(a). You state Exhibit H pertains to structural pest control, which the department regulates pursuant to Chapter 1951 of the Texas Occupations Code. *See* Occ. Code § 1951.003. You state Exhibit I pertains to enforcement actions under Chapter 13 of the Agriculture Code, which contains statutory provisions related to the regulation of weighing and measuring devices. You further state the department has the authority to assess administrative penalties against individuals who violate the cited statutory provisions. Agric. Code § 12.020. You further explain the department litigates enforcement proceedings under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. You represent to this office that the information in Exhibits F, H, and I encompasses the department's entire litigation files with regard to the investigations at issue. We understand the files were created by attorneys, staff, and other representatives of the department in anticipation of litigation. *Cf.* Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to section 552.103). Based on your representations, we conclude the department may withhold Exhibits F, H, and I as attorney work product under rule 192.5 of the Texas Rules of Civil Procedure.

We now address your arguments for Exhibits C, D, and G. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R.

EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information in Exhibits C, D, and G constitutes notes and communications amongst department attorneys and employees that were made for the purpose of providing legal services to the department. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the department may withhold Exhibits C, D, and G under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*. In *Open Records Decision No. 615 (1993)*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See ORD 615 at 5*. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of*

Garland v. The Dallas Morning News, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You seek to withhold the draft in Exhibit E under section 552.111. You contend the information at issue contains advice, opinion, and recommendations relating to the department's policy matters. Upon review, we find the draft in Exhibit E constitutes a draft of a policymaking document. You indicate the draft document was created prior to the issuance of the final version. Therefore, if the draft document will be released to the public in its final form, then the department may withhold the draft in its entirety under section 552.111.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Therefore, the department must withhold the credit card number we have marked under section 552.136. We note you have also marked a hotel account number under section 552.136. However, we find you have not demonstrated how this information, whether used alone or in conjunction with another device, may be used to obtain money, goods, or services, or to initiate a transfer of funds. Thus, we find you have failed to demonstrate how the hotel account number constitutes an "access device number" for purposes of section 552.136. Therefore, the

department must withhold only what we have marked under section 552.136 of the Government Code.

You seek to withhold e-mail addresses contained in the remaining submitted information pursuant to section 552.137 of the Government Code. Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). You do not state whether the owners of the addresses you have marked have consented to their release. Therefore, the department must withhold the marked e-mail addresses under section 552.137, unless the owners consent to release.

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147(a). You have marked two eleven-digit numbers in the submitted information that are included on a form under the category "Texas Identification Number." However, you do not explain how this number constitutes a social security number for purposes of section 552.147. Therefore, the department may not withhold the information you marked under section 552.147.

In summary, the department may withhold Exhibits F, H, and I as attorney work product under rule 192.5 of the Texas Rules of Civil Procedure. The department may withhold Exhibits C, D, and G under section 552.107(1). The department may withhold Exhibit E under section 552.111 if the draft document will be released to the public in its final form. The department must withhold the information we marked under section 552.136. The department must withhold the information you marked under section 552.137, unless the owners consent to release. The remaining information must be released.⁴

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

⁴This office recently issued Open Records Decision No. 684, a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including credit card numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to be 'Chris Schulz', written over the word 'Sincerely,'.

Chris Schulz
Assistant Attorney General
Open Records Division

CS/em

Ref: ID# 394089

Enc. Submitted documents

c: Requestor
(w/o enclosures)